

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TODD S. MORROW,

Plaintiff,

v.

**DELAWARE BUREAU OF
COMMUNITY CORRECTIONS,**

Defendant.

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C.A. No. N15C-10-237 FWW

Submitted: December 28, 2016

Decided: December 28, 2016¹

Upon Defendant's Motion for Summary Judgment
GRANTED.

ORDER

Todd S. Morrow, *pro se*, 260 Macon Lane, Smyrna, Delaware 19977; Plaintiff.

Ryan P. Connell, Esquire, Delaware Department of Justice, 820 North French Street, Wilmington, Delaware 19801; Attorney for Defendant.

WHARTON, J.

¹ The Court granted Defendant's Motion for Summary Judgment after argument on December 28, 2016. This Order more fully explains that decision.

This 30th day of December 2016, upon consideration of Defendant Delaware Bureau of Community Corrections' ("DBOCC") Motion for Summary Judgment ("Motion"), Plaintiff Todd Morrow's ("Morrow") Response, and argument on December 28, 2016, and the Court having granted the Motion after argument and desiring to more fully set forth its reasons, it appears to the Court that:

1. On October 28, 2015, Morrow filed a Complaint against the DBOCC alleging that the DBOCC, a bureau of the Department of Correction, deliberately discriminated against Morrow on the basis of his age when it declined to hire Morrow as an entry-level Probation and Parole Officer.² Morrow contends that such conduct by the DBOCC is in direct violation of 19 *Del. C.* § 711(a)(1).³
2. On November 23, 2016, the DBOCC filed the Motion.⁴ The DBOCC argues that summary judgment is appropriate at this juncture because it has offered a legitimate, nondiscriminatory explanation as to why Morrow was not selected for an interview.⁵ Specifically, the DBOCC contends that a member of its hiring panel remembered Morrow from a prior position with

² Pl.'s Compl., D.I. 1, at ¶¶ 2, 25–26. Morrow agreed to dismiss a retaliation claim, with prejudice, "because Plaintiff obviously does not have the time or resources that Defendant has to fight this issue in combination with the age discrimination in employment case." *See* Pl.'s Answering Br., D.I. 53, at ¶ 5.

³ D.I. 1 at ¶¶ 25–26.

⁴ Def.'s Opening Br., D.I. 50.

⁵ *Id.* at ¶¶ 3–4.

the DBOCC.⁶ A member of the hiring panel remembered that Morrow was involved in a training incident involving pepper spray, and believed Morrow's demonstrated behavior during the incident was odd.⁷ Therefore, the panel declined to offer Morrow an interview, despite his exceptional qualifications.⁸ With this nondiscriminatory rationale put forth, the DBOCC argues that Morrow has failed to prove by a preponderance of the evidence that the DBOCC's reasons for failing to interview Morrow were pretextual.⁹

3. Superior Court Civil Rule 56(c) provides that summary judgment is appropriate when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." When considering a motion for summary judgment, the Court's function is to examine the record to determine whether genuine issues of material fact exist "but not to decide such issues."¹⁰ The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.¹¹ If the moving party meets its burden, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact to

⁶ *Id.* at ¶ 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at ¶ 4.

¹⁰ *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

¹¹ *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

be resolved by the ultimate fact-finder.¹²

4. Pursuant to § 711(a)(1), it is unlawful for an employer to “[f]ail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual’s . . . age” The plaintiff may prove age discrimination by either direct or indirect evidence through the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*.¹³
5. Under the *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of age discrimination.¹⁴ In order to establish a prima facie case of age discrimination against an employer, the plaintiff must prove the following facts: (1) that the plaintiff was within the protected age group; (2) that the plaintiff was qualified for the position in question; (3) that the plaintiff suffered an adverse employment action; and (4) that the plaintiff was replaced by a younger person or a person outside the protected age group.¹⁵ Typically, the plaintiff’s burden in establishing a prima facie case of age discrimination “is not particularly onerous.”¹⁶

¹² *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

¹³ See 411 U.S. 792 (1973). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–46 (1989); *Riner v. Nat’l Cash Register*, 434 A.2d 375, 376–77 (Del. 1981).

¹⁴ See *Jones v. School Dist. of Philadelphia*, 198 F.3d 344, 352 (3d Cir. 1999).

¹⁵ See *Taylor-Bray v. Dep’t of Servs. for Children, Youths and their Families*, 2015 WL 1228319, at *4 (D. Del. Mar. 17, 2015), *aff’d*, 627 Fed. Appx. 79 (3d Cir. 2015); *Riner*, 434 A.2d at 377.

¹⁶ *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 369 (3d Cir. 2008).

6. Once the prima facie case has been established, “thus permitting (but not requiring) the trier of fact to infer that discrimination has occurred,”¹⁷ then the burden shifts to the employer to proffer “legitimate, nondiscriminatory” reasons for its actions.¹⁸
7. If the employer meets this burden, then the burden shifts back to the plaintiff to demonstrate, by a preponderance of the evidence, that the employer’s “proffered reasons are mere pretexts designed to cover discriminatory motives.”¹⁹ To demonstrate that the employer’s proffered reasons are mere pretexts, the plaintiff must “point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer’s action.”²⁰ Therefore, to avoid summary judgment, “the plaintiff’s evidence rebutting the employer’s proffered legitimate reasons must allow a factfinder reasonably to infer that *each* of the employer’s proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment

¹⁷ *Riner*, 434 A.2d at 377.

¹⁸ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

¹⁹ *Riner*, 434 A.2d at 377.

²⁰ *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

action (that is the proffered reason is a pretext).”²¹

8. For purposes of this Motion, the DBOCC concedes that Morrow has established a prima facie case of age discrimination. With the burden shifting to the DBOCC, the Court finds that the DBOCC has proffered a legitimate, nondiscriminatory reason for not interviewing Morrow. Richard Figurelle (“Figurelle”), a member of the DBOCC’s hiring committee, previously worked with Morrow at the DBOCC.²² Figurelle remembered a “bizarre training incident” in which Morrow was involved.²³ Specifically, Morrow volunteered to be pepper sprayed as part of a training exercise, the purpose of which was to demonstrate the effects of pepper spray.²⁴ When the instructor of the exercise pointed the pepper spray at Morrow, Morrow lunged at the instructor, grabbed his legs, and proceeded to tackle the instructor on the pavement.²⁵ Remembering Morrow’s “odd behavior,” Figurelle recommended to the hiring manager, Francisco Rodriguez, that Morrow not be offered an interview.²⁶

9. Because the DBOCC produced a legitimate, nondiscriminatory reason for

²¹ *Harding v. Careerbuilder, LLC*, 168 Fed. Appx. 535, 537 (3d Cir. 2006) (quoting *Fuentes*, 32 F.3d at 764 (internal citations and quotation marks omitted)).

²² D.I. 50, Ex. A.

²³ *Id.*

²⁴ *Id.*

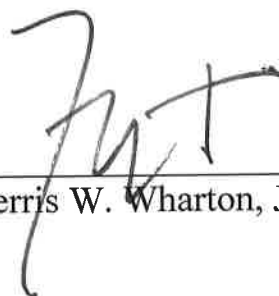
²⁵ *Id.*

²⁶ *Id.* Francisco Rodriguez’s Affidavit confirms that Figurelle told him about Morrow’s incident, and as a result, Rodriguez elected to not interview Morrow. See D.I. 50, Ex. B.

not interviewing Morrow, Morrow must “have the opportunity to show that the employer’s proffered reasons are mere pretexts designed to cover discriminatory motives.”²⁷ Despite this opportunity, Morrow is unable to prove, by a preponderance of the evidence, that the DBOCC’s proffered reasons are pretextual. Morrow has not presented any evidence to the Court that would allow a fact-finder to reasonably infer that the DBOCC’s nondiscriminatory reasons were fabricated. Indeed, Morrow did not depose anyone in this case, even Figurelle, and he did not submit any affidavits to contest the DBOCC’s explanation for not hiring him. Morrow instead attempts to sidestep this burden by arguing whether Figurelle mischaracterized the incident that took place years ago. However, a dispute about whether Figurelle mischaracterized an incident that took place in the past is wholly unrelated to age discrimination. As a result, Morrow has failed to overcome his burden under the *McDonnell Douglas* framework.

THEREFORE, Defendant’s Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.



Ferris W. Wharton, J.

²⁷ *Riner*, 434 A.2d at 377.